Supreme Court, U.S.
FILED
DEC 14 1998
CLERK

No. 98-450

In the
Supreme Court of the United States
OCTOBER TERM, 1998

MARTIN CROMARTIE, *et al.*,
Appellants,

v.

JAMES B. HUNT, JR., *et al.*,
Appellees,

— and

ALFRED SMALLWOOD, *et al.*,
Intervenor-appellees.

On Appeal from the United States District Court for the Eastern District of North Carolina

APPELLANTS' BRIEF OPPOSING MOTIONS OF STATE APPELLEES AND INTERVENOR-APPELLEES TO DISMISS OR TO AFFIRM

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SUMMARY OF ARGUMENT

Appellees have presented technical arguments designed to persuade this Court that it should not review the district court's order allowing use of North Carolina's 1998 redistricting plan. However, the plain language of 28 U.S.C. § 1253 authorizes this appeal; and the issues raised by this appeal merit full consideration by the Court. These issues concern the manner of review that a remedial plan should receive from the district court after the State legislature has twice enacted redistricting plans which violate the Equal Protection Clause. In resolving these issues, the Court can make clear that the State must bear the burden of proof that its remedial plan is not race-based and must show that the plan conforms to traditional districting principles.

I. THIS COURT HAS JURISDICTION TO REVIEW THE ORDER OF THE DISTRICT COURT APPROVING USE OF THE 1998 REDISTRICTING PLAN.

The history of this case refutes State appellants' contention that this Court lacks jurisdiction to review the three-judge district court's order of June 19, 1998.[1] After the complaint was filed on July 3, 1996, a stay order was granted

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[1]Much of this history is contained in the Appendix to the Jurisdictional Statement filed by the State appellants in *Hunt v. Cromartie*, (hereinafter "*Hunt* J.S. App.") and in the Joint Appendix filed by the parties in that appeal (hereinafter "*Hunt* J.A."). The State appellees and intervenor-appellees in this appeal are the appellants in *Hunt v. Cromartie*, No. 98-85, where they seek to overturn the district court's summary judgment that District 12 in the 1997 redistricting plan was unconstitutional and could not be used in the 1998 elections. That appeal is set for argument on January 20, 1999.

to await the outcome of the *Shaw* litigation. Then, on October 17, 1997, the stay was dissolved and an amended complaint was filed – which asked the district court to enjoin use of the 1997 redistricting plan "in the 1998 elections or any subsequent congressional elections" and to "direct the General Assembly to draw promptly a plan that is not tainted by the current plan and that is prepared without regard to race, party or incumbency." *Hunt* J.A. 8-9. The complaint alleges that the General Assembly "with a predominantly racial motive" enacted a new redistricting plan in March 1997, *Hunt* J.A. 16-17, and that because it resulted from and was "caused by the predominantly racial motivation that gave rise to the January 1992 and July 1991 plans, the March 1997 plan is the fruit of those racially gerrymandered plans – and is tainted by them." *Hunt* J.A. 18. Having alleged their standing to contest both the First District and the Twelfth District in the 1997 redistricting plan, *Hunt* J.A. 18-20, the plaintiffs prayed (1) that a three-judge district court be convened; (2) that the 1997 redistricting plan be declared "unconstitutional and of no further force and effect"; (3) that the court direct the General Assembly to prepare a new plan "which will not be derived from any earlier unconstitutional plan"[2]; (4) that the court enjoin the defendants

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[2]*See* Paragraph 3 of the amended complaint's prayer for relief, *Hunt* J.A. 21, which reads:

> The Court direct the General Assembly to prepare promptly a new redistricting plan for the State of North Carolina which will not be derived from any earlier unconstitutional plan and which will not concentrate in any congressional district persons of a particular race or color – whether black, white, native American, or otherwise – in a manner that is totally unrelated to considerations of compactness, contiguousness, and geographic or jurisdictional communities of interest; and if the General Assembly does not prepare promptly such a plan, then the Court itself prepare such a plan with the aid of suitable impartial experts.

from conducting congressional elections "until the General Assembly enacts, and the Department of Justice preclears, a new redistricting plan as prayed for in Paragraph 3 above"; and (5) that the Court "enter both a temporary restraining order and preliminary injunction enjoining" the State defendants from "taking any action in preparation for primary or general elections" for Congress "until the General Assembly enacts and the Department of Justice preclears a new redistricting plan as prayed for in paragraph 3 above." *Hunt* J.A. at 20-22.

After a three-judge court had been designated on January 23, 1998, the plaintiffs moved for a preliminary injunction on January 30, 1998, *see Hunt* J.A. 1, and alleged that in devising the 1997 plan, "the General Assembly used as its starting point the unconstitutional" 1992 plan and that "the boundaries of the Twelfth and First Districts are again predominantly motivated by race and cannot pass the strict scrutiny test." *Hunt* J.A. 38. They prayed for a "preliminary injunction prohibiting congressional elections from taking place under the congressional redistricting plan enacted by the General Assembly in March 1997.[3] After various other pleadings had been filed, the court conducted a hearing on March 31, 1998, and on April 3 entered an order which found that the Twelfth District was unconstitutional, granted "Plaintiffs' motion for a preliminary injunction and Plaintiffs' request for a permanent injunction as contained in its complaint," and enjoined the defendants from conducting any primary or general election under the 1997 plan. *See Hunt* J.S.

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[3]On February 5, 1998, the plaintiffs filed a motion for summary judgment declaring that "in the 1992 redistricting plan, the First District – like the Twelfth – was an unconstitutional racial gerrymander, and also declaring that the Twelfth and First Congressional Districts under that 1997 plan are unconstitutionally gerrymandered" and enjoining their use in the 1998 congressional election or any future election. *Hunt* J.A. 2 and 44.

App. 45a-46a.[4]

On April 21, 1998, the court entered an order directing the General Assembly to submit to it by May 22, 1998 a revised redistricting plan and stating that within "three business days of enactment of the new legislation, Plaintiffs will inform the Court in writing whether they will oppose the legislation or not, and, if they oppose the legislation, they will provide the basis for their objections in detail. Defendants will have three (3) business days to respond to any objections." *Hunt* J.S. App. 55a-56a. The same order provided that if a new redistricting plan was not approved by the court and promptly precleared by the Department of Justice, the court would "assume sole responsibility for an interim plan for the 1998 elections." *Hunt* J.S. App. 56a. The order set out a schedule for the filing period, primary and general election, "whether conducted under a legislative plan or a court ordered plan." *Hunt* J.S. App 56a. On May 22, 1998 – the deadline prescribed by the court – the defendants submitted a new redistricting plan enacted by the General Assembly the day before.

The plaintiffs then submitted timely objections to the 1998 redistricting plan, wherein they pointed out that the plan was still predominantly motivated by race and was tainted by the two preceding unconstitutional plans.[5] In turn, on June 1,

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[4]Three days later, summary judgment was entered to the same effect. *Hunt* J.S. App. 49a.

[5]In addition to a map which showed that the 1998 plan had many "vestiges" of the unconstitutional 1992 and 1997 plans, plaintiffs demonstrated that the "new" plan still linked concentrations of blacks in Forsyth County at the northern extreme of District 12 with an even larger concentration of blacks in Mecklenburg County at the southern extreme. Of its five counties, District 12 still split four; and its voters were in two different metropolitan areas and in different media markets. In the 1998

1998, the defendants filed a response in support of the 1998 plan. On June 2, 1998, an order was entered by the district court which allowed use in the 1998 elections of the plan which the General Assembly had adopted in May. *Hunt* J.S. App. 175a-180a. The order specifically noted that it had not

> made a legal ruling on the constitutionality of District 1. The 1998 plan is only approved with respect to the 1998 congressional elections, but the Court reserves jurisdiction with regard to the constitutionality of District 1 under this plan and as to District 12 should new evidence emerge. This matter should therefore proceed with discovery and trial accordingly.

Hunt, J.S. App. 179a-180a. The plaintiffs then appealed from this order.

Under 28 U.S.C. § 1253,[6] this Court has jurisdiction over this appeal. Plaintiffs were seeking a preliminary

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plan, 70% of the African-Americans in Forsyth County were assigned to District 12 – an increase from 65% in the 1997 plan; and in Mecklenburg County, the percentage of blacks assigned to District 12 increased to 90% in the 1998 plan from 84% in the 1997 plan.

[6] 28 U.S.C.§ 1253 states:

> Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

injunction and a permanent "injunction"[7] in a "civil action" which by statute was "required . . . to be heard and determined by a district court of three judges." After "notice," a "hearing" took place on March 31, 1998. Plaintiffs initially succeeded in obtaining a permanent injunction against the 1997 plan, but the court's order of June 22, 1998 denied them the interlocutory injunction they sought against use of the 1998 plan in the 1998 elections[8] and also denied the requested permanent injunction pending a trial. Therefore, the appeal is authorized by 28 U.S.C. § 1253. Also, a case and controversy exists between the parties because the 1998 plan will be used in the next elections.[9] Furthermore, the questions appellants have presented in this appeal are important in determining whether an injunction should be granted against use of the 1998 plan in any future elections.

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[7]Unlike *Mitchell v. Donovan*, 398 U.S. 427 (1970), which state appellees cite in their brief at page 9, plaintiffs were not seeking a declaratory judgment.

[8]From the time of filing the amended complaint, plaintiffs were seeking an injunction not only against the 1997 plan but also against any new plan "derived from any earlier unconstitutional plan." The opposition they filed to the 1998 plan asserts that this plan was derived from the earlier plans. Therefore, in light of the court's order of April 21, 1998, the "opposition and objections to the revised 1998 redistricting plan" were a reaffirmation of the earlier motion that the defendants be enjoined from using any plan derived from the unconstitutional 1992 plan. The order entered by the district court on June 22, 1998 denied plaintiffs the injunctive relief that they had requested.

[9]N.C. Session Law 1998-2 provides for use of this plan not only in the 1998 elections, which have now taken place, but also in future elections unless this Court reverses the district court's decision that the 1997 plan was unconstitutional.

II. APPELLANTS HAVE PROPERLY RAISED TWO IMPORTANT ISSUES FOR REVIEW BY THIS COURT.

From the filing of the amended complaint, appellants have consistently claimed that the General Assembly was required to enact a plan not predominantly motivated by race and free from any trace or vestige of earlier unconstitutional plans.[10] In their objections to the 1998 redistricting plan, the plaintiffs contended that it violated these requirements; and they cited precedents indicating that the defendants should bear the burden of proving that the "vestiges" of the earlier unconstitutional plans had been removed.[11] Thus, contrary to the argument of intervenor-appellees, the district court was on notice of plaintiffs' contention as to the proper allocation of the burden of proof. Furthermore, even if plaintiffs had not previously raised this issue, they would not be precluded from appealing an order predicated on a finding that resulted from

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[10]In support of their contentions, appellants have used the analogy of the "fruit of the poisonous tree," *see e.g. Taylor v. Alabama*, 457 U.S. 687 (1982); *Dunaway v. New York*, 442 U.S. 200 (1979); *Brown v. Illinois*, 422 U.S. 590 (1970); *Wong Sun v. United States*, 371 U.S. 471 (1963); *Nardone v. United States*, 308 U.S. 338 (1939). Also, they have cited precedents concerning the obligations of school boards and district courts to eliminate the "vestiges" and "traces" of racially segregated school districts. *See, e.g., Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971); *Dayton Bd. of Educ. v. Brinkman*, 443 U.S. 526 (1979).

[11]*See* Plaintiffs' Opposition and Objections to the Revised 1998 Redistricting Plan (at p. 3), quoting *Brown v. Bd. of Education*, 892 F.2d 851, 859 (10th Cir. 1989); *School Bd. of the City of Richmond v. Baliles*, 829 F.2d 1308, 1311 (4th Cir. 1987). *See also* Opposition at p.6.

the district court's misallocation of the burden of proof.[12]

Appellees cite *Scott v. United States*, 920 F. Supp. 1248 (M.D. Fla. 1996), *aff'd sub nom. Lawyer v. Department of Justice*, 521 U.S. 567 (1997), for the principle that the burden of proof is on the plaintiffs during the remedial phase of a challenge to a race-based district. However, *Scott* did not involve a plan being reviewed by a three-judge district court after an earlier plan had been held by that court to violate the equal protection clause; and in *Lawyer*, this Court did not even discuss – much less approve – the trial court's allocation of burden of proof.[13] The allocation of burden of proof as to a remedial redistricting plan poses a substantial issue which the

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[12]The cases cited by intervenor-appellees in their motion (at p.8) relate to claims first asserted on appeal, and do not concern the right to appeal an order which results from a misallocation of the burden of proof. Likewise, their contention that appellants should have filed a motion to alter or amend under Fed. R. Civ. Proc. 59(e) as a condition for appealing the district court's order of June 22, 1998 is unprecedented.

[13]As to the assertion by intervenor-appellees that appellants "offer no principled rationale" for placing the burden of proof on the proponents of a remedial plan, appellants submit that the precedents they have cited concerning elimination of the "vestiges" of racially-segregated schools and excluding the "fruit of the poisonous tree" are very "principled" analogies. As to the attempted distinction of the school desegregation, *see* Intervenor-Appellees' Brief at 10-11, appellants reply that the protection of voter rights against equal protection violations is important in a democratic society; that – as the Court recognized in *Shaw v. Reno*, 509 U.S. 630 (1993) – the harms caused by racial gerrymandering are significant; and that North Carolina has been singularly recalcitrant in complying with *Shaw*'s mandate. Meanwhile, legislators and district courts elsewhere have "reembraced the traditional districting practices that were almost universally followed before the 1990 census." *See Bush v. Vera*, 517 U.S. 952, 985 (1996). Thus, in other states throughout the nation, the "vestiges" of racially-gerrymandered redistricting have been removed.

Court should answer.[14] That answer would provide guidance for the district court in determining whether the 1998 plan may be used for future elections.[15]

According to its legislative history, the unconstitutional 1997 plan was motivated in part by a desire to protect incumbents, maintain a 6-6 partisan balance, and preserve the cores of the districts in the unconstitutional 1992 plan. The purported reasons for the 1998 plan are almost identical. Appellants have consistently maintained that a remedial plan enacted to perpetuate results reached under an unconstitutional racially-gerrymandered plan is the "fruit" of the earlier plan and retains the "vestiges" of that plan. This contention was reasserted in the opposition and objections plaintiffs filed to the 1998 plan and also has been stated in the brief which appellants filed in *Hunt v. Cromartie* – where they are appellees.

In entering its order of June 22, 1998, the district court relied on *Wise v. Lipscomb*, 437 U.S. 535, 540 (1998), for the proposition that a federal district court should allow leeway for a state legislature to devise a substitute plan and that the state legislature "should not be restricted beyond the clear commands of the Equal Protection Clause." This reliance was misplaced because the present case is concerned with enforcement of "the clear commands of the Equal Protection Clause" that "traditional districting principles" should not be subordinated to race. Since the 1992 and 1997 plans subordinated these "principles" to race, it was necessary as a

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[14]See Question 2 in the Jurisdictional Statement at page i.

[15]The court's order of June 22, 1998 calls for a trial as to the constitutionality of District 1 in the 1998 plan and also allows the plaintiffs to offer further evidence as to the unconstitutionality of District 12. The allocation of burden of proof will be significant in this trial.

condition for approval of the 1998 plan for the district court to determine that the traditional districting principles were no longer subordinated to race. On this issue, the burden of proof rested on the defendants and the threshold test was that the 1998 plan complied with "traditional districting principles." The district court failed to apply this test; and so its order approving the 1998 plan was in error.

CONCLUSION

Appellants have properly raised two important issues for the Court to consider. The consideration of these issues at this time is especially appropriate because the Court has granted full review to the related case of *Hunt v. Cromartie* and also because determination of the issues raised here will provide guidance for the district court in its future consideration of appellants' ongoing effort to finally root out the "vestiges" of North Carolina's racially-gerrymandered redistricting plans. With such guidance, the court will enjoin use of the 1998 plan.

Respectfully submitted,

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December 14, 1998

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